In the

Supreme Court of The United States

October Term, 1969

No. 11[redacted] 87

UNITED STATES, Petitioner

v.

THE DISTRICT COURT IN AND FOR THE COUNTY OF EAGLE AND STATE OF COLORADO

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF COLORADO

AMICUS CURIAE BRIEF FOR THE STATE OF WYOMING

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No. 1178

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v.

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AMICUS CURIAE BRIEF FOR THE STATE OF WYOMING

STATEMENT

For purposes of this Brief, the State of Wyoming adopts the first five sections of the Brief of the Petitioner, the United States. Specifically, the OPINION BELOW, JURISDICTION, QUESTIONS PRESENTED, STATUTE INVOLVED, and STATEMENT.

STATEMENT OF INTEREST

The unadorned issue in this case is whether or not the U.S.D.A. Forest Service must use water on reserved lands in the arid West within the framework of state water law?

The Federal Government owns 48 percent of Wyoming's surface. As the result of that ownership, the Federal Government potentially controls an even larger percentage of the total available water supply in Wyoming. This is because much of the federal ownership is in the mountainous areas of the State where there is an abnormally high rainfall.

Because the results in this case may also be controlling in Wyoming, and because a holding for the United States would have a very substantial effect on the administration of Wyoming water law, the State of Wyoming files this Brief in an effort to preclude partial or total abrogation by this Court of its State created body of water law.

The sine qua non of effective governmental administration of a limited resource is control of all of the resource. Wyoming can no more effectively control half of the water in the State than the Federal Government can control the monetary system if Wyoming is granted a license to counterfeit.

SUMMARY OF ARGUMENT

I

Congress could not have specifically intended that the McCarran Amendment be applicable to reserved rights because reserved rights were nonexistent when the McCarran Amendment was passed. Given the plain wording of the statute and the fact that the law's sponsors were from Nevada and Utah, very arid States, the only logical conclusion is that Congress would have applied the McCarran Amendment to reserved rights if reserved rights

existed when the law was enacted. A holding that the McCarran Amendment is inapplicable to reserved rights will make all state created water rights, regardless of priority, inferior to reserved rights because of a procedural quirk.

II

This case is not justiciable because the Court cannot fashion a workable remedy. In addition, the Court should not decide this case because Congress is presently making extensive investigations via the Public Land Law Review Commission preparatory to enacting legislation in the area involved in this case.

III

The reservation doctrine is a creature of this Court, and was created without a pretext of statutory authority. As such, this Court can and should abrogate reserved rights because of the major undesirable impact an efficacious reserved rights doctrine will have on the established economics of Western States. This result can be justified because the extension of the Winters Doctrine to *Arizona v. California* overlooked the fact that *Winters* was grounded on policy of giving special consideration to the Indians; a premise that did not exist in *Arizona v. California*. In addition, a viable reservation doctrine will constitute a total failure to the Federal Government to honor an implied promise made to thousands of homesteaders; " if you develop the land by applying water to it you can have the land and the right to use the water."

IV

When the Federal Government takes water out of priority, it violates the Fifth Amendment prohibition against uncompensated taking for public purposes.

ARGUMENT

I

APPLICATION OF THE McCARRAN AMENDMENT

A. To be completely candid, when the McCarran Amendment, 66 Stat. 560, 43 U.S.C. 666, was enacted on July 10, 1952, Congess did not intend to include reserved rights within the ambit of that legislation. It could not. The reserved rights doctrine, as the United States wants it interpreted, did not exist on July 10, 1952.

The contemporary reserved rights doctrine was created on June 3, 1963, the date of the decision in *Arizona v. California*, 373 U.S. 546 (1963). It is not clear from the United States Brief what kind of reserved rights the United States opts for in the instant case.[1] It is possible to determine, however, two kinds of reserved rights that the United States does not seek. One is the kind of right represented by *F.P.C. v. Oregon*, 349 U.S. 435 (1955) (otherwise known as the *Pelton Dam* decision). In its argument supporting the validity of the reserved rights doctrine, the United States does not rely on the *Pelton Dam* decision.[2] The second potential kind of reserved rights which the United States could not logically be pursuing here are

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[1] In this connection, it is important to recognize that there may be several kinds of reserved rights. Charles F. Wheatley, Jr., describes five kinds of reserved water rights in a recent study dealing with water resources prepared for the Public Land Law Review Commission. As Mr. Wheatley points out, a sixth kind of reserved right may exist depending upon one's view of *Winters v. United States*, 207 U.S. 564 (1908). C. WHEATLEY, STUDY OF THE DEVELOPMENT, MANAGEMENT AND USE OF WATER RESOURCES ON THE PUBLIC LANDS, at 80-84 (1969).

[2] See Brief for the United States at 9.

Winters Doctrine rights. There are no Indian reservations in the Eagle River system.[3] This last point is important because Winters Doctrine rights are the principal kind of reserved rights which predate the McCarran Amendment. Because the United States appears, in this case, to be claiming only the kind of reserved rights represented by *Arizona v. California*, it follows that Congress could not have intended anything pro or con vis-a-vis the McCarran Amendment and the rights claimed by the United States in this case, consequently the rights involved here could not have been within the ken of Congress until ten and one-half years following Congressional enactment of the McCarran Amendment.

That being so, the only thing this Court can determine is, would the Congress have included reserved rights in the McCarran Amendment if *Arizona v. California* had been decided prior to enactment of the McCarran Amendment? Unfortunately, this is the kind of exercise in semantics and legal reasoning which permits a variety of results; all points of view can be sustained.

For example, from the United States' viewpoint, it can be argued that the Winters Doctrine was extant when the McCarran Amendment was enacted. The Winters Doctrine is a reservation doctrine, and it cannot be assumed that Congress was unaware of *Winters v. United States*, 207 U.S. 564 (1908); therefore, the failure of Congress to include Winters Doctrine rights in the McCarran Amendment manifests an intent on the part of Congress, not to include any reserved rights in this legislation. The fallacies with that position are twofold. First, the Winters Doctrine was in fact rather obscure in 1952; Congress could easily have overlooked a 44-year old Supreme Court case. Second,

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[3] AMERICAN HERITAGE, THE AMERICAN HERITAGE BOOK OF INDIANS, 406-07 (1961).

and more persuasive, Congress was dealing with a legislative waiver of the sovereign immunity of the United States. It would have been inconsistent with the United States' duty as the Indians guardian to have included Winters Doctrine rights in this legislation.[4]

Another argument is that if Congress is to legislate away the sovereign immunity of the United States, it must do so with specificity; i.e., it must specify reserved rights in the statutory language. It seems this argument must fail because Congress lacked the clairvoyance to legislate concerning a doctrine that was not to come into existence until after enactment of the McCarran Amendment.[5] Apparently not even the U.S. Department of Agriculture, the Federal Government's most ardent advocate of the reserved rights doctrine, believed the reserved rights doctrine existed in 1952 when the McCarran Amendment was enacted. Until 1965 the Forest Service Manual directed its field personnel to perfect water rights in compliance with state law.[6] A review of the records of the Wyoming State Engineer's Office reveals that between 1960 and 1965, the Forest Service—as the sole applicant, initiated 46 applications for permits to develop water rights in accordance with Wyoming law within national forests.[7] The latest applications filed by the Forest Service for permits to perfect

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[4] *E.g., U.S. v. Osage County*, 251 U.S. 128 (1919).

[5] The McCarran Amendment was enacted July 10, 1952. The *Pelton Dam* decision was decided June 6, 1955, and *Arizona v. California* was decided June 3, 1963.

[6] Note, *Water in the Woods: The Reserved-Rights Doctrine and National Forest Lands*, 20 STAN. L. REV. 1187, 1193-95, citing THE FOREST SERVICE MANUAL (1933), *Id.*, (1936), *Id.* at § 2541.03 (1965).

[7] Report entitled *Forest Service Filings Since 1960*, on file in the office of the Wyoming State Engineer.

water rights in a national forest in Wyoming were 4 applications filed on April 7, 1965.[8] How can it be argued that Congress should have been aware of the reservation doctrine in 1952, if the Forest Service, the primary proponent of the doctrine did not discover it until 1965?

This leaves us with the specific language of the legislation being considered. A careful reading of the language conveys the apparent clear intent of Congress to make the McCarran Amendment as all inclusive as possible, given the fact that Congress could not have been aware of the *Pelton Dam* or *Arizona v. California* decisions. In the first phrase of the first sentence, Congress has declared that the waiver involved applies to "any suit."[9] It is difficult to imagine a more inclusive, less equivocating, single word than "any." It seems a reasonable interpretation of Congressional intent to assume that "any suit" means what it says, and that Congress thereby intended that the United States should be a party to "any suits" in the Western United States for adjudication of water.

In the second sentence of the statute, the same all inclusive language appears again: "when a party to *any* such suit, [the United States] . . . shall (1) be deemed to have waived *any* right."[10] Again Congress has not equivocated. It simply is not reasonable to read "any right"

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[8] These four applications, Permits Nos. 22762, 22763, 22764 and 22771, were submitted over the signature of John S. Mead, Regional Engineer for the Department of Agriculture in Denver, Colorado. Permits Nos. 22762, 22763 and 22771 were for diversions and use in the Big Horn National Forest. Permit No. 22764 was for diversion and use in the Black Hills National Forest. Permits Nos. 22762 and 22763 were for domestic use. Permit No. 22764 was for stock water use. Permit No. 22771 was for domestic (recreation) use.

[9] 66 Stat. 560, 43 U.S.C. 666.

[10] *Id.* (Emphasis added).

to mean "any right except rights not perfected bursuant to state law"! Congress intended that *all interests* be included in Western water adjudication procedures, and said so.

The United States has argued that the McCarran Amendment does not apply to it unless an "entire river system" is being adjudicated. That the statute does not include the word "entire" is patent. That Congress was trying to make the statute as broad as possible is also evident for the phrase "river system" is followed by the all inclusive phraseology "or other source."[11] It seems obvious that Congress was unimpressed by the Justice Department's objection to a multiplicity of actions. The phraseology "or other source" implies that as far as Congress was concerned, the United States was to be a party to adjudication of a Western water right from any source, springs through river systems inclusive.

It has been argued that there was no Congressional intent to include the United States in adjudications of Western water rights where the United States' rights were based on the doctrine of reserved rights. It has been demonstrated above that this position must fail because Congress could not have enacted the McCarran Amendment with any awareness of the reserved rights doctrine, as that theory was not articulated by this Court until three years (the *Pelton Dam* decision in 1955) or ten and one-half years (*Arizona v. California* in 1963) after enactment of the legislation. The argument also overlooks the all inclusive language of the statute; the United States is a proper party if it owns or is in the process of acquiring water rights "under state law, by purchase, by exchange, *or otherwise*."[12]

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[11] 66 Stat. 560, 43 U.S.C. 666.

[12] *Id.* (Emphasis added).

This legislation was sponsored by Senators McCarran of Nevada and Watkins of Utah. It may reasonably be assumed that those gentlemen were familiar with Western water law. It is inconceivable that the sponsors of this legislation could have intended that the United States, as owner of over 45 percent of the surface area of the eleven Western States, [13] should not be included in the system of laws that controls a valuable and limited resource—water. To permit the United States to perfect water rights in the arid West outside the jurisdiction of the states, will make a shambles of Western water administration. It simply defies reason to assume the Senators from states as arid as Nevada and Utah could have intended such a result.[14]

B. Assume for argument's sake that the United States prevails in the instant case. This poses an interesting procedural question. The United States agrees that its reserved rights are "subject to water rights vested as of [the] . . . date [of withdrawal]."[15] If the McCarran Amendment does

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[13] C. WHEATLEY, STUDY OF THE DEVELOPMENT, MANAGEMENT, AND USE OF WATER RESOURCES ON THE PUBLIC LANDS, at 80-84 (1969). Page A-4 of the Appendix Table A-1 shows that the total area of the eleven Western States is 758,156,920 acres. Of this, 345,220,662 acres is Public Domain, or 45.5341%.

[14] This is particularly evident upon closer examination of the WHEATLEY report (*supra note* 13), Appendix Tables A-1 and C-1. Both states lie primarily in the Great Basin. Nevada has the lowest average annual precipitation of any of the states. Appendix C, p. C-3. Utah has an estimated annual average precipitation of 11.5 inches, with the Great Basin averaging 5 to 9 inches per year. Approximately 85 percent of Nevada and 68 percent of Utah surface area is owned by the United States Government. *F. Trelease, Cases and Materials on Natural Resources* 362 (1965). Except for Alaska, no two states have a higher percentage of the land in Federal ownership. *Id.*

[15] Brief for the United States at 9.

not apply to reserved rights, how does a private holder of a right senior to a reserved right get into court?

It would be naive to assume that the United States would not rely on a sovereign immunity defense in all cases if it prevails in the instant case.[16] How does this private individual enforce his senior water right against the United States? The United States will not voluntarily recognize senior rights until a court of competent jurisdiction renders a decision that the private party does in fact hold a senior right.[17] The dilemma is that if the United States prevails in this case, there will be no court of competent jurisdiction. The hypothetical situation presupposes the inapplicability of the McCarran Amendment to reserved rights, therefore, in a stream-wide adjudication in state court, the court will not have jurisdiction over the most important appropriator, the United States and

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[16] *Cf., Glenn v. United States*, Civil No. C-153-61 (D. Utah Mar. 16, 1963).

[17] A specific example of the Forest Service's refusal to recognize valid senior rights occurred in the Medicine Bow National Forest in Wyoming in the summer of 1969. The Forest Service aided and abetted a contractor in the violation of Wyoming water law by diverting 300,000 gallons of water from the South Fork of Lodge Pole Creek. The water was to be used in construction work, within the Forest, at an interstate highway rest stop, which is not a purpose for which the Forest was reserved.

The reservation date was June 5, 1925, by Executive Order 4245. South Lodge Pole Creek has 8 adjudicated water rights with priorities earlier than 1925; in fact, 7 of these rights predated statehood, the earliest being 1874. The total of the 8 rights is 35.6 c.f.s.

It seems quite clear that the use of this water was in derogation of senior adjudicated rights. The Forest Service made no attempt to work with State water administration officials to keep this activity within State law, or even conform this usage to the Justice Department's view of reserved rights.

its reserved rights. Paradoxically the private holder of a senior right cannot obtain adjudication of his own prior right as against the United States or anyone else because of "the fact that all of the claimants to water rights along the river are not made parties." *Dugan v. Rank*, 372 U.S. 609, 618 (1963).

II

POLITICAL QUESTION

A. Both parties agree, as does the State of Wyoming, that the U. S. Supreme Court has jurisdiction to hear this appeal. Justiciability is another matter. Wyoming seriously doubts that the Court would find this matter justiciable if it knew the dimensions of the "can of worms" it is opening. Phrased another way, Wyoming questions the justiciability in this case based on tests 2, 3, 4 and 6 in Mr. Justice Brennan's opinion in *Baker v. Carr*, 369 U.S. 186, 217 (1962).

"[T]he nonjusticiability issue centers on a determination of the kinds of things courts can and cannot do effectively."[18] This is in essence Mr. Justice Brennan's test number 2.[19]

It is assumed that the *Arizona v. California* kind of

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[18] Laughlin, *Comments on Powell v. McCormack*, 17 *U.C.L.A.* L. Rev. 113 (1969).

[19] "[2] or a lack of judicially discoverable and manageable standards for resolving it;" 369 U.S. 186, at 217 (1962).

reserved rights are in issue here.[20]. A holding that the McCarran Amendment is inapplicable to the *Arizona v. California* variety of reserved rights will be a beginning, not an ending. Above all, such a determination will not be an effective remedy.

That such a holding will abrogate over 100 years of Western water law is not the root problem here. Abrogation with concomitant replacement of the abrogated system may be justifiably distasteful to a great many people but that procedure is usually workable. People will function with rules they dislike in preference to no rules at all. Here we would have abrogation with a concomitant legal void. It seems of the upmost urgency to convey to the Court the fact that its replacement of Western water law, or the common law system of riparian rights, would be an unfair, highly unpopular, and distasteful result the

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[20] As the reservation doctrine now stands, it includes Winters Doctrine rights. These have never posed much in the way of practical problems in the arid West because the Indians have been slow to develop sustained irrigation. There are the *Pelton Dam* kind of reserved rights which are grounded on no harm to other appropriators and no consumptive or out of basin water usage. It is this variety of reserved rights which Wyoming thinks the United States is disinterested in.

Finally, there is the kind of reserved right with an unlimited consumptive use of water that the Court created in *Arizona v. California*. Without doing violence to the Court's language, *Arizona v. California* can be read to be limited to the four specific federal areas enumerated, though most writers have given the language a wider conotation.

"We agree with the conclusions of the Master that the United States intended to reserve water sufficient for the future requirements of the Lake Mead National Recreation Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest." 373 U.S. 546, 601 (1963).

populace could live with. The creation of a legal void is an entirely different matter.[21]

Because the Court usually cannot, in one stroke, enact an entire body of law, but can abrogate all or a major part of an existing system, it leaves unanswered a multitude of questions. If it assumes the role of Western Water Master, it may expect to answer literally hundreds of questions, some of which are enumerated here.

1. As between various reserved rights, who will have the better right inter se in times of shortage?
2. How will wasteful water practices be controlled? Who will have standing to litigate against wasteful uses of reserved rights, both as to consumptive uses and pollution?
3. As between reserved rights, Winters Doctrine rights, and state developed rights, what kind of rights will have preference (not to be confused with priority); domestic, fire fighting, irrigation, recreation, flood control, stock water, et al?
4. If Winters Doctrine rights and state created rights are treated differently vis-a-vis Forest Service rights, does this create an Equal Protection problem?
5. Can reserved rights be transferred out of basin?
6. Apparently "reserved rights" are federally owned property. Under the property clause, they can probably be transferred. Can the U.S. Department of Agriculture take a private party's junior water right then sell it back to him yearly?
7. Who will replace the very large administrative

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[21] *Cf.*, footnote 17, *supra*.

organization created in the Western States to control and administer water in times of shortage?

8. How will a senior state right get a Forest Service junior upstream right turned off?

9. How about the reverse situation? Does the Court expect a county paid administrator to shut off a state perfected right in deference to a senior downstream Forest Service right or Indian right?

10. If the exercise of a "reserved right" renders a Bureau of Reclamation project uneconomical, will the landowner still be expected to pay off on his contract to the U.S. Department of Interior even though the U.S. Department of Agriculture created the circumstances which prevented the landowner from performing on his contract?

The foregoing is not intended to be anything like a full catalogue of future problems. Nor is it intended to convey the notion that a system of Federal Western Water Law could not be made to operate. It is intended to convey the idea, however, that the development of such a system is a legislative task suitable only for Congress. If the water users in the West, both private and federal, must await this Court's definition of a new body of Federal Western Water Law, case by case, we are just beginning a long and expensive judicial exercise. The Court may indeed make a determination in this case; but for reasons it cannot now control, it will not create an effective remedy if it upholds the United States.

The Court should, we believe, be particularly cognizant of the effect a holding in this case will have on existing interstate water compacts and Supreme Court decrees. For example, most of the interstate compacts in the West recognized and protected perfected water rights that were extant when the compacts were consummated. None of

these compacts or their negotiators anticipated reserved rights. What will be each state's obligation to account for reserved rights in determining its compact entitlement. Wyoming is entitled to 80 percent of the flow of the Big Horn River as measured below the last diversion from the river above its confluence with the Yellowstone River.[22] This provision of the compact recognizes existing rights; i.e., it apportions unused and unappropriated water, as of December 8, 1950. The retroactive effect of reserved rights is totally inconsistent with the philosophy of the compact.

How will reserved rights be integrated with this Court's decree in *Nebraska v. Wyoming*?[23] Colorado and Wyoming have substantial reserved lands in the North Platte drainage; Nebraska does not. The decree limits both Colorado and Wyoming to specific irrigated acreages. As the Forest Service puts additional land under irrigation in the years ahead, must private Colorado and Wyoming irrigators take corresponding amounts of land out of production? In Wyoming such a result will most directly affect the Kendrick Project of the Bureau of Reclamation; i.e., the U.S. Department of Agriculture will be taking water from a Bureau of Reclamation project. If this practice is not followed, Nebraska will be obliged to bear the total burden of the exercise of any and all reserved rights that are implemented in Colorado or Wyoming, in the North Platte River drainage.

B. The other phase of the "political question" problem involved here is grounded on Mr. Justice Brennan's tests

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[22] Article V, Yellowstone River Compact.

[23] 325 U.S. 589 (1945); *Decree modified*, 345 U.S. 981 (1953).

numbers 3, 4 and 6 in *Baker v. Carr.* [24] The basis for the argument is the Congressional activity in the area involved in this case as manifested by the creation and work of the Public Land Law Review Commission.

The Public Land Law Review Commission is an investigative organization; fairly uncommon as a Commission of both the House of Representatives and the Senate. The Commission was created in 1964.[25] Originally it was to have a 5-year life, to expire six months after filing a report with the President and Congress on June 30, 1969. Congress extended its life one year and the report is now due June 30, 1970.[26] All indications are that the report will be filed by the June 30, 1970, deadline, and the Commission will go out of existence on December 31, 1970.

Although the final report of the Commission is presently a closely guarded secret, the scope of its activity and its purpose are not. The purpose of the broad and extensive investigation of the Commission is stated in the legislation:

> **"Congressional declaration of policy**
>
> It is hereby declared to be the policy of Congress that the public lands of the United States shall be (a) retained and managed or (b) disposed of, all in a manner to provide the maximum benefit for the general public.

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[24] "[3] or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion;". "[4] or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government;". "[6] or the potentiality of embarassment from multifarious pronouncements by various departments on one question." 369 U.S. 186, 217 (1962).

[25] Public Law 88-606, 78 Stat. 982 (1964), 43 U.S.C. §§ 1291-1400 (1964).

[26] Public Law 90-213, 81 Stat. 660 (1967).

"**Review of public land laws**

Because the public land laws of the United States have developed over a long period of years through a series of Acts of Congress which are not fully correlated with each other and because those laws, or some of them, may be inadequate to meet the current and future needs of the American people and because administration of public lands and the laws relating thereto has been divided among several agencies of the Federal Government, it is necessary to have a comprehensive review of those laws and the rules and regulations promulgated thereunder and to determine whether and to what extent revisions thereof are necessary."[27]

Based on this imprimatur, Congress, through the Public Land Law Review Commission, has been investigating Federal Public Land Laws for six years, and has appropriated $7,390,000 for the task. The general scope of the Commission activities and inquiry have been reasonably well documented.[28] The PLLRC negotiated a contract with Charles F. Wheatley, Jr., et al, for nearly $100,000 to investigate the specific problems in issue in this case; i.e., water rights on public lands.[29] This study was initially supposed to cover:

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[27] 43 U.S.C. §§ 1391-92 (1964).

[28] Phipps, *The PLLRC—A Challenge to the West*, 1 LAND & WATER L. REV. 355 (1966); Phipps, *The PLLRC—Identifying and Defining the Problems*, 2 LAND & WATER L. REV. 251 (1967); Phipps, *The PLLRC—Status Report*, 4 LAND & WATER L. REV. 297 (1969).

[29] Mr. Charles Conklin, Assistant Director of the Public Land Law Review Commission, quoted an expenditure of $97,640,000 to date, on the Wheatley contract. This figure was quoted during a telephone conversation with Senator Hansen's office on June 15, 1970.

> "Federal laws and policies relating to the use and management of water originating on or flowing across public lands for both federal and nonfederal uses . . . with particular attention being given to the implied reservation doctrine of federal water rights resulting from withdrawals and reservations of public lands. The study also includes an analysis of the relationship of land and resource management programs on the public lands to water yields and water quality to determine their effectiveness in providing for water uses on public lands and for local and regional water needs."[30]

In addition to the considerable space directed to the reserved rights question, the Wheatley Report devotes ten pages to the McCarran Amendment.[31]

Grant that the Court should only legislate interstitially [32] and given both the legislative scope of any opinion rendered by the Court in this case, as discussed in A above, plus Mr. Justice Brennan's tests 3, 4 and 6 in *Baker v. Carr*, the Court may be well advised to permit Congress the first opportunity to solve this problem. Our system works far better if the Court reviews Congressional Acts, rather than vice versa. Unhappily, any action the Congress now takes concerning reserved rights will be a review, at least partially judicial in nature. Congress really has no choice vis-a-vis the reserved rights doctrine unless it abdicates the field to the Court, an unpleasant prospect given the usually

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[30] Phipps, *The PLLRC—Identifying and Defining the Problems*, 2 LAND & WATER L. REV. 251, at 267-68 (1967).

[31] C. WHEATLEY, STUDY OF THE DEVELOPMENT, MANAGEMENT, AND USE OF WATER RESOURCES ON THE PUBLIC LANDS, at 189 to 199 (1969).

[32] *Arizona v. California*, 373 U.S. 546, 628 (1963) (Justice Douglas' dissenting opinion).

unsatisfactory quality of judicial legislation. Rather than compound the problem, it would seem desirable to give Congress the first opportunity to perform its designated function with the McCarran Amendment problem rather than have Congress sit in review of the Court's action.

Finally, a comparison of the scope of the investigation of the PLLRC dealing directly with the problems in issue as compared with the information available to the Court, plus the relative investigative abilities of the Congress as compared to the Court, should, we think, be an indication of the wisdom of a holding that this case lacks justiciability because it presents a political question.

III

RESERVATION DOCTRINE

A. The genesis of the reserved rights doctrine is generally conceded to be *Winters v. United States*, 207 U.S. 564 (1908). The next and only other really significant case involved in the evolution of the doctrine is *Arizona v. California*, 373 U.S. 546 (1963).[33]

The view of many people in the Western States who are close to and familiar with Western water law and Western water problems, is that the holding in *Arizona v. California* was wrong vis-a-vis reserved rights, not only for what that holding did, but for what it failed to do. Many Western water lawyers' candid reaction would be that the Court did not comprehend the magnitude of its

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[33] Apparently the United States would agree with this statement. *Cf.*, Brief for the United States at 6.

holding. If it had, it would have either reached a different result or been far more thorough and detailed in supporting the result it did reach.

The magnitude of the *Arizona v. California* holding does indeed justify comment:

> "[W]ater rights have already vested in private persons for the irrigation of eighteen million acres of land and . . . private property values dependent upon these vested rights are estimated at between fifteen and twenty billions of dollars."[34]

Now consider that in two brief sentences, without benefit of any reasoned legal argument, citation of any case law, or statutory authority, the Court cast a huge cloud of undelineated proportions on the majority, and probably all, of the 18 million acres of land mentioned above. The Court's language bears repeating:

> "The Master ruled that the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal establishments such as National Recreation Areas and National Forests. We agree with the conclusions of the Master that the United States intended to reserve water sufficient for future requirements of the Lake Mead National Recreation Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest."[35]

Unhappily, the Master's Report is equally unenlightening. On pages 292 and 293, the Master concludes that the

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[34] Martz, *The Role of the Federal Government in State Water Law*, 5 KAN. L. REV. 626, 631 (1957), citing, 1 COMMISSION ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT WATER RESOURCES AND POWER, 15 (1955).

[35] *Arizona v. California*, 373 U.S. 546, 601 (1963).

United States "had the power to reserve water in the Colorado River for use in the Lake Mead National Recreation Area." We agree. That the United States *Congress* has such power and authority appears correct, given proper constitutional restraints. In the next paragraph, the first full paragraph, on page 293, the Master goes on to find that "I have found that the United States intended to reserve water for the area."

WHERE? WHEN? HOW?

The owners of $20 billion of property rights were certainly entitled to a more comprehensive explanation than the Court or the Master provided here. This Court has very accurately stated the basic proposition:

> "To convert [an unexcercised power of Congress] . . . to one automatcially abolishing preexisting water rights on a nationwide scale calls for a convincing explanation of that purpose. We find none."[36]

Unhappily, in *Arizona v. California,* the Court did not conduct the same search that it appears to have undertaken in the *Niagara Mohawk Power* case.

It is hoped that the Court will not overlook the fact that there is no citation to *any statutory authority* to support the reserved rights in:

1. The Brief of the United States in this case.
2. The Court's opinion in *Arizona v. California* in support of the extension of the Winters Doctrine to the other Federal Reservations.
3. The Master's Report in *Arizona v. California* in support of his extension of the Winters Doctrine to the Lake Mead National Recreation Area.

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[36] *F.P.C. v. Niagara Mohawk Power Corp.,* 347 U.S. 239, 252-53 (1954).

The sole authority in support of the *Arizona v. California* variety of reserved rights is *Winters*. The decision in the *Winters* case is not supported by any statutory authority. It is perhaps rhetorical to ask, why has not a statutory authority been cited to support an action which has such broad implications? Obviously no Congressional action has been relied upon because no such action has ever been taken.

As stated above, we agree with the Master in *Arizona v. California* that the United States probably did, and does, have the power, within constitutional limits, to reserve water for its national forests when it sets them aside. That is, we agree that the United States has the power as it is exercised through the legislative process. The Master did not elaborate on the question of where he felt that power lay. The problem that vexes the Western States is that the Congress has never exercised that power. *That power has been exercised solely by this Court!* This is particularly unfortunate because, as discussed elsewhere, there is a serious constitutional question surrounding the reservation doctrine. Can the people who believe the reserved rights doctrine may violate the United States Constitution, anticipate an objective hearing from the same body that enacted the law or doctrine being called into question?

Consider the other side of the coin. Has there been any Congressional action which would indicate Congress did not intend to reserve water for use on reserved lands when it made the original reservation? The answer is of course that there is abundant authority to demonstrate a Congressional philosophy that runs counter to the reservation doctrine.

Mr. Charles E. Corker, in a discussion of the *Pelton Dam* decision, correctly observed that: "the Court [did not] . . . heed . . . the almost unbroken line of statutes by

which Congress has deferred to state laws respecting water rights."[37] In support of his statement, Mr. Corker cites 26 laws enacted by Congress.[38]

A more blunt but equally accurate comment was made in a Law Review article dealing with *Arizona v. California*:

> "[T]he opinion in *Arizona v. California* reflects a doctrinaire conceptualism that has dominated a majority of the Court for twenty years. Since the *First Iowa* case the Court has uniformly overridden congressional attempts to establish a system for state and federal governments to share the decision-making power on water resource development. The system Congress seemingly adopted was the double veto; the Court, however, has uniformly eliminated the state veto. A brief review of the leading cases will sustain the contention that the Court steadfastly adheres to the view that the decision-making power in water resource allocation should be an exclusive federal function, regardless of what Congress says.
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> "This review of the principal cases concerned with federal-state relations in water resource development leads the author to the conclusion that neither judicial precedent nor legislative history nor administrative construction nor even the plain meaning of the statute will stand in the Court's way of allocating exclusive decision-making power on water resource development to the federal government."[39]

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[37] Corker, *Water Rights and Federalism—The Western Water Rights Settlement Bill of 1957*, 45 CALIF. L. REV. 604, 613 (1957).

[38] *Id* at 613. Footnote 27.

[39] Meyers, *The Colorado River*, 19 STAN. L. REV. 1, 61, 65 (1966).

As both authors point out, the Court has consistently cast aside all arguments supporting state control of Western water, notwithstanding numerous Acts of Congress which bespeak a Congressional philosophy totally inconsistent with the reserved rights doctrine. These decisions have uniformly been made with little or no statutory support for the result.

The Court has consistently held that the three Acts of Congress most generally cited to support state control of Western water, Act of July 26, 1866, 14 Stat. 253; Act of July 9, 1870, 16 Stat. 218; and the Desert Land Act of 1877, 19 Stat. 377; do not apply to reserved lands.[40] The rationale has always been that those Acts dealt only with public lands. How could Congress have enacted laws in 1877 excepting reserved lands, as opposed to other public lands, when the concept of reserved forest lands did not come into the law until 1891?[41] In 1866, 1870 and 1877 all lands in the West not in private ownership were public lands. In 1891, with the repeal of the Timber Culture Acts, the concept of forest reserves came into the law.[42]

It seems fair to conclude, particularly in view of the total absence of any statutory authority supporting the reservation doctrine, that if Congress meant to change the Western water law philosophy as expressed by the Desert Land Act, it would have expressly said so. A closer inspection of *all* of the law which created a national forest policy, lends strong support to the argument that Congress had no such intent.

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[40] *E.g.*, *F.P.C. v. Oregon*, 349 U.S. 435 (1955).

[41] 26 Stat. 1095, 1103 (1891).

[42] B. HIBBARD, A HISTORY OF THE PUBLIC LAND POLICIES, 530 (1924).

As stated in Mr. Hibbard's book,[43] the Timber Culture Acts were a failure and were repealed. As a rider on the repeal, § 24 of 26 Stat. 1095 (1891) was enacted; this rider authorized the President to set apart public land bearing forests:

> "That the President of the United States may, from time to time, set apart and reserve, in any state or territory having public land bearing forests in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation declare the establishment of such reservations and the limits thereof."[44]

On its face it is patent that this law did not specifically reserve water on these lands. This word "water" is never mentioned in this portion of the enactment.

Yet, Congress obviously was aware of Western water problems. Water, canals, ditches, reservoirs, reclamation, and irrigation are discussed in this law in seven different places.[45] It is also interesting to note that Congress did make specific reservations in this law. Congress reserved coal, precious metals, townsites or land occupied by the United States for a public purpose, fish culture station sites, the Pribylov Group or Seal Islands of Alaska, the right to regulate the taking of salmon, the Annette Islands, gold, silver, cinnabar, copper, lead—everything but water.

Congress was cognizant in this law of both Western water and its right to reserve everything imaginable, Everything but water. The result in *Arizona v. California* notwithstanding, when Congress passed the basic law under

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[43] *Id.*

[44] 26 Stat. 1095, 1103 (1891).

[45] 26 Stat. 1095, 1097, 1101, 1102 (1891).

which national forests were to be set aside by the President, it did not reserve water on those lands. In fact it did just the opposite. The following quotation is from § 18 of the law in question:

> "That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any State or Territory, which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also the right to take, from the pulic lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch: *Provided*, That no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and maps of location shall be subject to the approval of the Department of the Government having jurisdiction of such reservation, *and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories.*"[46]

B. Now let us return to the Master's Report. In extending the Winters Doctrine rights to other Federal Reservations, the Master said:

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[46] *Id.* at 1101-02 (Emphasis added).

> "Although the authorities discussed above which establish the reservation theory all involved Indian Reservations, the principles seem equally applicable to lands used by the United States for its other purposes . . . . Certainly none of the parties has suggested a tenable distinction between the two situations."[47]

The fact that none of the parties suggested tenable distinctions between Winters Doctrine rights and reserved rights does not mean such distinctions do not exist. They do! Phrased in the simplest of terms, Indians are people. Ducks, and deer, and trees are not people. The entire sense of the *Winters* case is that all "conflicting implications" and "ambiguities" are to "be resolved from the standpoint of the Indians."[48] Phrased another way, Indians are entitled to special protection:

> "Manifestly, the Indians cannot be expected to acquire water rights to any considerable extent through prior appropriation, because they are not far enough advanced in the art of agriculture to reduce the water to a continuous use, and the water of the public streams that they shall finally need depends largely upon their progress in this art."[49]

Wyoming believes the *Winters* case was a good result given proper answers to the unresolved questions that the

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[47] *Arizona v. California*, 373 U.S. 546 (1963), Master's Report, pp. 292-93.

[48] *Winters v. United States*, 207 U.S. 564, 576 (1908).

[49] *United States v. Conrad Inv. Co.*, 156 F. 123, 128 (C.C.D. Mont. 1907).

case poses.[50] Wyoming believes, however, that the result can only be justified if it is grounded on fair and humane treatment for a minority group of people.

By what legerdemain can a tree or a duck be accorded the same treatment? The unvarnished fact is that as the reservation doctrine stands after *Arizona v. California*, the U.S. Department of Agriculture can, if it chooses, take anyone's drinking water supply to raise trees. That the U.S. Department of Agriculture would do so without compunction seems clear from *Glenn v. United States*, Civil No. C-153-61 (D. Utah, Mar. 16, 1963). The paradox is that the *Winters* case was decided to protect a minority group, Indians, from later arrivals; i.e., the homesteaders. That same case, through the conduit of *Arizona v. California*, is now the basis of allowing another late arriving majority, the Federal Government, to take water away from a different minority, the grantees of the homesteaders who lost the *Winters* case.

C. "Thus America became an asylum for the oppressed of Europe. The autocratic governments of northern

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[50] As with most judicial legislation, *Winters* created more questions than it answered. How much water? For how long? For what uses? Are the rights transferable? As between Indians, who has the better right? As between reservations, who has the better right? Are all uses of equal standing? irrigation? stock watering? garden irrigation, household use? For how many years can Indian rights be valid with non-use? Granted that laches does not run against the Federal Government, vis-a-vis Western water rights, does laches run against the wards of the Federal Government?

It is presently Wyoming's position that Winters Doctrine rights embrace irrigation, stock and domestic uses on the reservation. Although the law passed by this Court does not so provide those rights should be defined so as to preclude wasteful use of the water. For the benefit of the Indians and other appropriators, those rights should be quantified.

> Europe looked with indifference upon the rapid migration of their surplus population and capital to America; England actually encouraged it. But this rapid influx of population and capital changed the whole economic structure of this country. A plentiful labor supply in the East made it possible for the moneyed class to think of the West as a vast home market for manufactured goods. The pressure of immigration hastened the settlement of the remaining vacant lands of America. Moreover, it lent encouragement to those forces who looked beyond American boundaries, ever anxious to add broad acres to the public domain."[51]

> "From 1866 to 1920 the United States surrendered most of its power and discretion over non-navigable waters to the states. Imbued with a concept of unlimited public land resources and pursuant to a national policy of encouraging western migration and economic development, Congress passed the mineral and water resources of the public lands to the settler, without charge or limitation of any kind, and left to the states and local mining districts almost complete freedom of control over their development and use."[52]

In addition there was an almost urgent need felt by many people to settle the vast expanse of the land west of the 98th Meridian as a means of securing the territory against the English on the North, the Mexicans on the South, and the Russians to the West. Toward these ends, the Federal Government supplied people, via the homestead and mining laws, transportation and marketing

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[51] R. ROBBINS, OUR LANDED HERITAGE 127 (1942).

[52] Martz, *The Role of the Federal Government in State Water Law*, 5 KAN. L. REV. 626, 632 (1957).

facilities by public land grants to the railroads, and finally water. That water would be and is necessary for Western economic development has been recognized early[53] and late.[54] The question automatically arises, why did not the Federal Government turn control of land over to the states as it did water? The answer seems to lie in the differences in the properties of the two resources and the financial problems of the Federal Government. The public land laws were self-enacting and needed little supervision, and supervision was something the Federal Government could not provide.[55] Water, on the other hand, is easily transportable and evanescent; its proper control needs administration which the Federal Government could not provide.[56] Water being essential to the arid states, and ade-

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[53] "[John Wesley Powell] was convinced that outside the five southern public land states, and possibly the coastal states, the government had nothing left that was suitable for ordinary humid or semi-humid farming but scattered tracts and that new policies should be adopted for the arid lands beyond the 100th meridian, if they were to be made productive." PUBLIC LAND LAW REVIEW COMMISSION, HISTORY OF PUBLIC LAND LAW DEVELOPMENT, 420 (1968), referring to Powell's REPORT ON THE LANDS OF THE ARID REGION OF THE UNITED STATES.

[54] *Trelease, Arizona v. California: Allocation of Water Resources to People, States, and Nation,* 1963 SUPREME COURT REV. 158, 184-88.

[55] As a result, many valuable Western mineral lands passed into private ownership, notwithstanding, statutory provisions in public land laws designed to prevent the loss of mineral lands by the Federal Government.

[56] Indeed even today the Federal Government does not have the organization, personnel, or appropriated funds to administer water in the Western United States.

quate administration being necessary to its use, state laws were developed early to distribute water.[57]

The stage was set—land, transportation, and water. All that was needed was people, and they came by the thousands. Because Congress failed to allow large enough homesteads, as suggested by Powell,[58] many failed. The more persistent pioneers bought out the unsuccessful, developed the water, and succeeded, secure in the belief that they had patents from the Federal Government to the land, and certificates of appropriation from the state for water. They had every right to harbor those beliefs; why shouldn't they? Those opinions were consistent with Congressional policy beginning in 1866,[59] as far as can be discerned from any source, including the Brief for the United States in this case; that is still the policy of Congress. And well it should be.

It seems fair to attribute to Congress high enough standards to assume that the Congress would not have enticed people onto the arid Western lands and then rendered their labors and investments worthless by taking away their water. One is forced to ask, what next? May we not assume with equal force that when the national forests were set aside that Congress intended to reserve rights-of-way? Granted Congress did not say so, but then where did

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[57] Wyoming had a Territorial Engineer in charge of water administration in 1888, two years before statehood. The earliest adjudicated Wyoming water right predated statehood by 28 years. That right is for 4 c.f.s. from the Bear River with a priority of May 1, 1862.

[58] Powell recommended entries of 2,560 acres. PUBLIC LAND LAW REVIEW COMMISSION, HISTORY OF PUBLIC LAND LAW DEVELOPMENT, 420 (1968), referring to Powell's REPORT ON THE LANDS OF THE ARID REGION OF THE UNITED STATES.

[59] Act of July 26, 1866, 14 Stat. 253.

they express any intent to reserve water? Is not a national forest meaningless without access?

The sad and unhappy fact is that the Federal Bureaucracy has joined hands with this Court to form an embryonic first cousin to the navigational servitude. That is a tragedy. One navigational servitude is too many in our system of government. A second, the reservation doctrine, is not only tragic but even worse, unnecessary. It is no surprise, however, that the U.S. Department of Agriculture is capable of creating such a doctrine; Parkinson[60] has adequately explained that phenomenon.

Finally, the Court should note that the Brief for the United States relies on *Arizona v. California* and the *Winters* case in support of the reservation doctrine.[61] Why has the *Pelton Dam* decision been left out?—it is frequently mentioned to support reserved rights. The answer seems abundantly clear. *Pelton Dam*, as the facts were cast by the F.P.C. license, did not permit any consumptive use of water, and required recognition of all perfected and unperfected rights.[62] That is not the kind of water rights the United States seeks. That it fully expects to harm private appropriators is patent. It seeks to perfect an 1892 water right in 1970.[63] Someone will be harmed, no one will be compensated.

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[60] C. PARKINSON, PARKINSON'S LAWS AND OTHER STUDIES IN ADMINISTRATION (1957).

[61] Brief for the United States at 9.

[62] *F.P.C. v. Oregon*, 349 U.S. 435, 440 (1955).

[63] The principal, and probably only, reserved lands in the Eagle River drainage are those within the White River National Forest. The White River National Forest was set aside on June 23, 1892, by Presidential Proclamation No. 29 signed by President Benjamin Harrison. The word "water" is not used in that proclamation.

IV

CONSTITUTIONAL QUESTIONS

The United States apparently does not and could not argue that the destruction of the agricultural value of land is a taking which requires compensation under the Fifth Amendment.[64] If a private party is entitled to compensation because flooding has destroyed all or part of the value of his land, by analogy he is just as entitled to compensation if the agricultural value of his land is destroyed by depriving the land of water.[65]

It is equally clear that the intent of the United States is to take reserved rights waters "for public use."

> "Most of these withdrawals from the public domain have been made for the express purpose of conserving important segments of that area for the future use and enjoyment of the entire public of the United States."[66]

It is perhaps necessary to lay to rest any question of the physical effect of an exercise of the reserved rights doctrine on a fully appropriated stream. In the arid West the

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[64] *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799 (1950). The ratio decidendi of the case is that the harm caused by the flooding, i.e., "the destruction of the agricultural value," not the flooding per se, is the basis for finding compensable damages. Certainly no damages would have been awarded if the flooding or raising of the water table had been beneficial. The destruction of agricultural value of the land justified the result, and not the manner in which the decrease in value occurred.

[65] *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950); *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799 (1950).

[66] Brief for the United States at 8.

totally appropriated stream is the rule, not the exception. It is obvious that if a new appropriator takes water out of a fully appropriated stream, he will, as a mathematical certainty, deprive a dowstream appropriator of water. This deprivation can be identified as to quantity and time. The specific individuals harmed can likewise be identified. In sum, all of the elements of an unconstitutional taking under the Fifth Amendment to the United States Constitution are present in the exercise of a reserved right if the United States did not have a valid water right as of the date of the reservation.

As we understand the position of the United States, the exercise of the reserved rights doctrine is not violative of the Fifth Amendment because the reserved rights have existed since the reservations in question were set aside. This position, if sustained, casts a cloud on $15 billion to $20 billion in property rights. That being so:

> "To convert [the *Winters* case] . . . from a [case to protect essential water rights of a small minority] . . . to one automatically abolishing preexisting water rights on a nationwide scale calls for a convincing explanation of that purpose."[67]

In *F.P.C. v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 252-53 (1954), the F.P.C. was proceeding under the color of authority of a statute: the Federal Water Power Act of 1920. If this Court felt the F.P.C. needed to show a "convincing explanation of . . . purpose" to abrogate a New York State water right, why should the Western appropriation states be entitled to less? Where is the convincing explanation of Congressional purpose to support either the reserved rights doctrine or the United States view that the McCarran Amendment does not apply to

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[67] *F.P.C. v. Niagara Mohawk Power Corp.*, 347 U.S. 239, 252-53 (1954).

reserved rights? It is for the United States to make a showing of a "convincing explanation of . . . purpose" to sustain abrogation of many valuable water rights in the Eagle River or elsewhere in the West. Not only is such "purpose" nonexistent, there is strong evidence to show that the contrary is true, as demonstrated by past conduct of the principal proponent of the reserved rights doctrine, the U.S. Department of Agriculture.

Since 1960 the United States Forest Service has filed 45 applications for permits to appropriate water in Wyoming pursuant to Wyoming State Law. Each of these 45 applications has been filed for a direct flow right for use within an existing national forest, and in each instance the Forest Service was the sole applicant. These figures do not consider any instances where the Forest Service was a co-applicant. The breakdown by years is: 5 in 1965, 15 in 1964, 8 in 1963, 11 in 1962, 4 in 1961, and 2 in 1960. The obvious question is, if the reservation doctrine has been valid since the national forests were first set aside during the last decade of the Nineteenth Century and the first decade of the Twentieth Century, what on earth is the Forest Service doing perfecting rights under state law 60 or 70 years later? Phrased another way, how can anyone expect individual appropriators who invested their money to perfect water rights, under the appropriation theory of Western Water Law, to be aware of the reserved rights cloud on their title if the owners of those reserved rights were unaware of the existence of said rights? The obvious answer is, you cannot. In order for the Forest Service to avoid the unconstitutional taking prohibition of the Fifth Amendment, it *must* show that all later appropriators knew or should have known that the rights they perfected were subject to the Government's prior reserved rights. How can the United States make such a showing when all

the facts sustain the conclusion that the Forest Service did not know that such rights existed?

We are aware that the Forest Service now makes the argument that their perfection of water rights under state law was simply a means of informing the states of their reserved rights. That fiction must have become "policy" with tongue in cheek. Wyoming has recently received the second annual computer print-out of claimed Forest Service reserved water rights in Wyoming.[68] That print-out lists 1,796 water rights. Of those 1,796 reserved rights, the Forest Service has filed applications for permits on 262. Query—why was it necessary to "notify" the State of appropriations for 262 reserved rights but not necessary to give such notification on 1,534 other rights?

Wyoming State Water Law provides that a water right be perfected by a procedure of filing an application to appropriate water, whereupon the State Engineer grants a permit to the appropriator to develop the water right. When the appropriation is completed, the State Board of Control "adjudicates" the right. This adjudication procedure is commenced upon request of the appropriator by the filing of a petition for adjudication. Of the 262 rights filed by the Forest Service, they have adjudicated, of their own volition, 191 rights. Query—if filing of a right was simply a means of notification, did that notification also require adjudication? If it did not, why did the Forest Service adjudicate any rights? If notification did require adjudication, why did not the Forest Service adjudicate all 262 rights?

The United States Forest Service, in the person of Arval L. Anderson, Acting Regional Forester in the Ogden, Utah, office of the Forest Service, filed a petition with the

[68] USDA, Forest Service, Denver, Colo., CURRENT AND FORESEEABLE WATER USES ON LAND RESERVED FROM THE PUBLIC DOMAIN (1970).

Wyoming State Board of Control requesting the Board's Order to correct erroneous land descriptions for adjudicated water rights, Permits Nos. 19,569 and 19,570.[69] All land descriptions involved in the correction are in Townships 30 and 31 North, and Range 115 West, of the 6th P.M. All of these locations are within the Bridger National Forest. The petition is dated December 7, 1953. The Bridger National Forest was reserved on October 17, 1916[70].

Query—if the Forest Service held a valid reserved water right in the Bridger National Forest with an October 17, 1916, priority date, why did the Regional Forester feel obliged in 1953 to petition the Wyoming State Board of Control for a corrected land description of a right over which the State of Wyoming has no control. Further, both the old and new land descriptions are within the national forest, therefore, under the reserved rights doctrine the Forest Service owned water rights in both locations. Why did it have to go through the expensive formal procedure of petitioning the State of Wyoming for a change; a letter would have served.

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[69] Specifically the petition requested that Permit No. 19,569 point of use be changed from "NW¼NW¼, Section 2, T. 30 N., R. 115 W.," to "point of diversion is S. 32° 12' E. 1811.3 feet from the SW corner of Section 35, T. 31 N., R. 115 W., and in the SW¼ NW¼, Section 2, T. 30 N., R. 115 W., and the water is used in Lot 4, Section 2, T. 30 N., R. 115 W." The point of use in Permit No. 19,570 was changed from "NW¼NW¼, Section 2, T. 30 N., R. 115 W.," to "point of diversion is S. 6° 45' E. 1481 feet from the SW corner of Section 35, T. 31 N., R. 115 W., and in the SE¼NE¼, Section 3, T. 30 N., R. 115 W., and the water is used in Lot 1, Section 3, T. 30 N., R. 115 W." Petition of the U.S. Dept. of Agriculture, Forest Service, to the Wyoming State Board of Control, dated November 30, 1953.

[70] Executive Order 2473.

Mr. Allen S. Peck, Regional Forester in Denver, Colorado, filed a petition with the Wyoming State Board of Control, requesting an Order of the Board changing the location of a headgate[71] in Section 4, Township 48 West, Range 106 West. That land is within the Shoshone National Forest. Section 4, Township 48 West, Range 106 West, is within land reserved March 30, 1891. The petition is dated February 18, 1941. As with the petition discussed in the preceding paragraph, why did not the Regional Forester write Wyoming a letter and "inform" the State Board of Control of the change? These examples are by no means exhaustive.

The point we make is that the Forest Service argument that they perfected water rights prior to October 1965 only as a means of notification of the states of their reserved rights is utter fiction! Their own actions prove the point. No one, including the Forest Service, gave any credence to the reserved right doctrine other than Winters doctrine rights until the *Pelton Dam* decision; that was in 1955. No one, including the Forest Service, gave credence to reserved rights other than Winters Doctrine rights, where the right permitted an impairment of privately held water rights until *Arizona v. California;* that was in 1963.

If the primary advocate of reserved rights, the Forest Service, did not realize the existence of these rights until 1963, how could a private party know or acknowledge their existence before 1963? It cannot reasonably be argued that, except for Winters Doctrine rights, a private party knew or should have known of the Forest Service's reserved rights before 1963 for the simple reason that no one, the Forest

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[71] The change was "from a point N. 72° 08' E, 1761.6 ft. from SW corner of Section 4, T. 48N., R.106W., to a point S.74° 5' E, 3041 ft. from the corner above described." Petition of the U.S. Dept. of Agriculture, Forest Service, to the Wyoming State Board of Control, dated February 18, 1941.

Service included, knew that a viable reserved rights doctrine existed until this Court's decision in *Arizona v. California*. It therefore follows that any reserved right with a priority date earlier than 1963 that deprives any prior appropriator of water, is a violation of the Fifth Amendment.[72]

CONCLUSION

The State of Wyoming does not harbor the anachronistic opinion that all of its waters should forever be used for irrigation. That view would ultimately result in a petrified economy. Quite the contrary, Wyoming water law has a built-in provision to permit the migration of water uses to higher or preferred uses, and all parties private and public are given the right to condemn water rights for application to higher uses.[73]

This system is admirably adapted to accommodate the migration of this limited resource to its highest and best use, including the needs of the Forest Service. If the Federal Government wishes to convert an irrigation use to a recreation use, it may do so by condemning an irrigation right. One of the advantages of this approach is that Congress must appropriate funds to finance the condemnation, and the conversion of the resource will thereby be given Congressional scrutiny. For years Wyoming has used this

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[72] *F.P.C. v. Niagara Mohawk Power Corp.*, 347 U.S. 239 (1954); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950); *United States v. Causby*, 328 U.S. 256 (1946).

[73] § 41-3, Wyo. Stat. (1957).

very system effectively. If a town, city, industry or other user needs water, he goes into the open market and purchases the right. If there are no sellers, he may condemn a suitable right provided the proposed use is a higher use than the present use. The older the priority date he purchases, the more valuable the right. This controls the price, but because the purchaser of the preferred right may condemn, he selects the least expensive right which is commensurate with his needs. This is another way of saying he selects the most junior priority he can find which hydrological studies show will give him the reliability necessary for his intended use.

It is this system which Wyoming believes must be applied to all appropriators. It does not really matter whether the system is administered by the State or Federal Government. What really does matter is whether or not all appropriators are subject to the system. If any substantial number of water uses or rights are not subject to the system, the entire system will not operate.

What is the logic of having all of the people contribute land to the national forests, and all of the people contribute taxes to purchase rights-of-way, and all of the people contribute taxes to support the Forest Service to manage the forests, and then pick out one person or a very limited group of people and force upon them the burden of contributing water? We would think it wrong to pick out a single manufacturer of pickup trucks and make him donate pickups to all the Forest Rangers so they can better manage the national forests to make them more useful and productive. How then can we justify making a few individuals supply water for the same ends?

The United States has tried to justify that result by the fiction of reserved rights. That policy has never been and is not now consonant with any philosophy ever expressed by the United States Congress. The best and fairest

result the Court can reach in this case is to abrogate the Court-created reserved rights doctrine. In the alternative, it should refuse to decide the case. Finally, if the Court does decide the case, it should make reserved rights subject to the McCarran Amendment. It can then define reserved rights, if Congress has not already done so, when this case is appealed after the Colorado courts adjudicate the Eagle River system.

Respectfully submitted,

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